(1) 061708 2007

No. _____

In the Supreme Court of the United States

TIM MALONE,

Petitioner,

v.

MINDY KAHLE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a female inmate's conditions of confinement expose her to an objectively substantial risk of sexual assault under circumstances where a male correctional officer has the ability to access her cell, but the officer has no history of sexual misconduct and there is no widespread history of correctional officers sexually assaulting inmates at the jail.

2. At what point does a risk of inmate assault become sufficiently obvious to overcome a correctional official's claim of qualified immunity under circumstances where the official denies that facts led him to infer that any inmate was exposed to a substantial risk of serious harm?

PARTIES TO THE PROCEEDINGS

The Petitioner in this matter is Pennington County Sheriff's Deputy Tim Malone in his individual capacity.

The Respondent is Ms. Mindy Kahle.

Other parties to the proceedings below which are not participants in this Petition include former Pennington County Correctional Officer Jermaine Leonard, Pennington County Sheriff Don Holloway and Pennington County Jail Administrator Scott Schuft.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities vi

Opinion Below 1

Jurisdiction 1

Statutes Involved 1

Statement of the Case 2

Statement of the Facts 6

Reasons for Granting the Writ 11

I. THIS COURT SHOULD PROVIDE GUIDANCE REGARDING A QUESTION WHICH IT HAS PREVIOUSLY EXPRESSLY LEFT OPEN CONCERNING AN IMPORTANT ISSUE IN § 1983 CASES BASED ON AN ALLEGED FAILURE TO PREVENT INMATE ASSAULT, AND WHICH IS CRITICAL TO QUALIFIED IMMUNITY ANALYSIS IN THOSE CASES: WHEN DOES A RISK OF INMATE ASSAULT BECOME SUFFICIENTLY SUBSTANTIAL TO SATISFY THE OBJECTIVE COMPONENT OF A

CONDITIONS-OF-CONFINEMENT CLAIM? 11

A. Deciding This Question Will Affect a Very Large Number of Cases 13

B. Resolution of the Issue is Essential For Analysis of Qualified Immunity in Failure to Protect Cases 14

C. The Eighth Circuit's Decision Conflicts with Decisions from the Tenth Circuit 16

1. *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998) 18

2. *Hovater v. Robinson*, 1 F.3d 1063 (10th Cir. 1993) 19

II. THIS COURT SHOULD PROVIDE GUIDANCE TO LOWER COURTS AS TO WHEN A RISK OF ASSAULT IS SUFFICIENTLY OBVIOUS TO OVERCOME A CORRECTIONAL OFFICIAL'S CLAIM OF QUALIFIED IMMUNITY UNDER CIRCUMSTANCES WHERE THE OFFICIAL DENIES THAT FACTS LED HIM TO INFER THAT ANY INMATE WAS EXPOSED TO A SUBSTANTIAL RISK OF SERIOUS HARM. 21

A. Qualified Immunity Principles 23

B. Application of Qualified Immunity Principles in a Failure to Protect Case 24

C. The Eighth Circuit's Decision Conflicts with Decisions from the Tenth Circuit and Principles Set Forth in Supreme Court Precedent 26

Conclusion 28

TABLE OF AUTHORITIES

Cases

Barney v. Pulsipher,
143 F.3d 1299 (10th Cir. 1998) 18, 26

Bell v. Wolfish,
441 U.S. 520 (1979) 3

Brosseau v. Haugen,
543 U.S. 194 (2004) 13, 14, 21

Boyd v. Fallman,
2003 WL 262323 (N.D. Cal. 2003) 16

Brown v. Budz,
398 F.3d 904 (7th Cir. 2005) 16

Dale v. Betancourt,
2006 WL 335358 (N.D. Cal. 2006) 16

Estate of Ford v. Ramirez-Palmer,
301 F.3d 1043 (9th Cir. 2002) 14

Farmer v. Brennan,
511 U.S. 825 (1994) . . . . . *passim*

Hovater v. Robinson,
1 F.3d 1063 (10th Cir. 1993) 19, 20, 26

Nelson v. CA. Dept. of Corrections,
2004 WL 569529 (N.D. Cal. 2004) 16

Robertson v. Newland,
2006 WL 509773 (E.D. Cal. 2006) 16

Woodford v. Ngo,
126 S. Ct. 2378 (2006) 13

Saucier v. Katz,
533 U.S. 194 (2001) . . . . . *passim*

Scott v. Harris,
127 S. Ct. 1769 (2007) 13, 14, 21, 24

Constitutional Provisions

United States Constitution Amendment VIII 1

United States Constitution Amendment XIV, § 1 1

Statutes

28 U.S.C. § 1331 3
28 U.S.C. § 1343 3
28 U.S.C. § 1367 3
42 U.S.C. § 1983 . . . . . 2, 3
S.D.C.L. § 24-1-26.1 10

PETITION FOR WRIT OF CERTIORARI

Petitioner, Pennington County Sheriff's Deputy Tim Malone, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit ("the Eighth Circuit").

OPINION BELOW

The Opinion of the Eighth Circuit is reported at 477 F.3d 544 and reproduced in Petitioner's Appendix (hereinafter "APP.") at 5a-20a. The Order denying rehearing *en banc* is reproduced at APP 2a.

JURISDICTION

The Judgment of the Eighth Circuit was entered on February 12, 2007, and the Order Denying Rehearing *En Banc* was issued on March 26, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. CONST. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. The Proceedings Below

Mindy Kahle filed a Complaint on March 9, 2004, in the U.S. District Court, District of South Dakota, Western Division. The Complaint alleged that Kahle had been sexually assaulted by a correctional officer, Mr. Jermaine Leonard, on December 14, 2002, at a time when she was being detained at the Pennington County Jail awaiting trial. Kahle sued Leonard, Petitioner Tim Malone who was supervising Leonard at the time, the jail administrator and the county

sheriff. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331 and 1343 on grounds that some of Kahle's claims alleged the violation of her federally protected constitutional rights and were brought pursuant to 42 U.S.C. § 1983, thereby raising federal questions. The district court's supplemental jurisdiction over Kahle's state law claims was invoked pursuant to 28 U.S.C. § 1367.

After completion of discovery all Defendants moved for summary judgment. Petitioner Tim Malone moved for summary judgment on grounds of qualified immunity. APP. 37a-40a.

The district court denied Malone's motion. With respect to qualified immunity, the Court's analysis consists of a single paragraph. APP. 38a. The court noted that "'failing to protect inmates from a foreseeable attack violates the Eighth Amendment when an official is 'deliberately indifferent to a substantial risk of serious harm.'" (citations omitted).[1] APP. 38a. The district court's opinion does not expressly state how or why Kahle was exposed to a "foreseeable attack" or to a "substantial risk of serious harm." APP. 38a. However, facts discussed in a subsequent section of the opinion provide a clue as to how the court determined the existence of such a risk. APP.39a-40a. The court reasoned that Malone was Leonard's supervisor and Malone knew or should have known Leonard

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[1] Because Kahle was a pretrial detainee rather than a convicted prisoner she is protected by the Fourteenth Amendment rather than the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). However, as the Eighth Circuit observed, the distinction makes little practical difference because pretrial detainees are entitled to the same protection under the Fourteenth Amendment as imprisoned convicts receive under the Eighth Amendment. APP. 12a, citing *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006).

was visiting Kahle's cell. The district court found those facts raised a genuine issue for trial with respect to whether "Malone was deliberately indifferent to the sexual assault committed on Kahle." APP. 39a-40a.

Malone took an interlocutory appeal from the denial of qualified immunity to the Court of Appeals for the Eighth Circuit. Malone argued, among other things, that he was entitled to summary judgment under the first prong of the qualified immunity analysis because Kahle's allegations did not state a violation of a constitutional right. Specifically, Malone argued that Kahle did not allege facts that showed she was incarcerated under conditions that exposed her to a substantial risk of serious harm — an essential element of a failure-to-protect claim. APP. 47a-50a. Malone directed the Eighth Circuit to express findings in the district court's opinion that "'Leonard never had been involved in a sexual assault of an inmate, so County Defendants had no notice he would commit such an act.'" APP. 49a, quoting APP. 32a. The district court also found that "[t]here were no complaints or other indications during Leonard's training that showed he posed a risk to inmates or would require additional or different supervision." APP. 23a.

Not only was there no evidence that Leonard posed a risk to inmates, there was no evidence that inmates were exposed to a substantial risk from any other correctional officers. The district court found "no evidence has been presented to show a persistent and widespread pattern of misconduct amounting to a county custom or policy of overlooking misconduct by COs." APP. 33a. See also APP. 26a-32a (analyzing other incidents which occurred at the Pennington County Jail prior to the incident involving Kahle and Leonard and how the county responded appropriately in each instance).

Although Malone expressly raised the issue of whether Kahle's allegations satisfied the *objective* component of a failure-to-protect claim — whether Kahle was incarcerated under conditions that exposed her to a substantial risk of sexual assault — the Eighth Circuit's opinion contained no analysis of that issue.[1] The Eighth Circuit's only reference to a "substantial risk of serious harm" is in the context of its analysis of the *subjective* component of a failure-to-protect claim — whether Malone was deliberately indifferent to a substantial risk of sexual assault. See APP. 12a-17a. Despite the district court's findings referred to above (no complaint or other indications during Leonard's training to show he posed a risk to inmates or would require additional or different supervision; no prior involvement by Leonard in sexual assault of an inmate; no persistent or widespread pattern of misconduct by correctional officers at the Pennington County Jail) the Eighth Circuit found that a factfinder could infer that Malone knew of a substantial risk from the very fact that the risk was "obvious". APP. 16a-17a quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). The opinion implies that risk was obvious because Leonard was entering Kahle's cell.

Malone petitioned the Eighth Circuit Court of Appeals for rehearing *en banc*. APP. 51a-62a. Malone demonstrated that the panel's opinion failed to analyze whether Kahle had been incarcerated under conditions that exposed her to a substantial risk of serious harm — the objective component of a failure-to-protect claim. The Eighth Circuit was urged to rehear the case *en banc* because it raised an issue expressly left undecided in *Farmer*: at what point a risk of harm becomes sufficiently substantial for Eighth Amendment purposes. APP. 59a; *Farmer*, 511 U.S. at 834, n. 3. The panel's decision also conflicted with decisions from the Court of Appeals from the Tenth Circuit as well principles set forth in the U.S. Supreme Court's decision in *Farmer*. APP. 54a-61a. If the law on these

essential elements of a failure to protect claim was not clearly established then Malone was immune from Kahle's claims under principles of qualified immunity. *Id.*

Malone's Petition for Rehearing was denied. APP. 1a-2a.

STATEMENT OF THE FACTS

The facts stated below are taken primarily from the opinions of the lower courts which are contained in the appendix. Both the district court and the Eighth Circuit Court of Appeals viewed the facts in a light most favorable to the Respondent. APP. 6a, 22a.

The Respondent, Mindy Kahle, was arrested on September 11, 2002 awaiting trial on charges of first-degree robbery and three counts of aggravated assault. APP. 22a; Doc. 81-7[2] pp. 10-11. She was incarcerated at the Pennington County Jail, and at all times relevant to her Complaint, was housed on the upper level of Cell Block 5. APP. 7a, 22a.

Jermaine Leonard applied for a correctional officer position with the Pennington County Jail in August 2002. APP. 6a. After an extensive background check Leonard was hired as a CO and began an eight-week training program. APP. 22a. The training included, among other things, classroom instruction on ethics, con-games, cell block observation, staff/inmate communications, and cross-gender supervision. APP. 23a. The training also included discussion

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[2] Documents contained in the district court record will be referred to by their assigned document number followed by the pages containing information supporting the referenced factual statement.

regarding prior incident of sexual misconduct at the Jail which Leonard understood violated Jail policy and state law. APP. 23a. In addition, Leonard was to receive six weeks of supervised, hands-on training. APP. 22a.

The district court found that Leonard gave jail officials no cause for suspicion: "There were no complaints or other indications during Leonard's training that showed he posed a risk to inmates or would require additional or different supervision." APP. 23a. "Leonard had never been involved in a sexual assault of an inmate, so County Defendants had no notice he would commit such an act." APP. 32a.

Petitioner Tim Malone was a senior correctional officer at the Pennington County Jail with three years of experience working on all cell blocks at the jail. APP. 24a. On the evening of December 14, 2002, Leonard's regular field training officer (FTO) was not on duty. APP. 24a. Malone was selected to supervise Leonard on that evening. *Id.* Malone was reacquainted with various reports and the FTO program, and was encouraged to ask questions of other FTOs. *Id.*

Inmates at the Pennington County Jail are locked down for the evening at 10:00 p.m. Correctional officers conduct regular cell checks every 30 minutes. Leonard conducted two regular cell checks between 10:00 and 11:00 p.m. that evening.

Between 10:00 p.m. and 11:00 p.m. on December 14, 2002, Leonard entered Kahle's cell three separate times. Two of those visits occurred during regularly-scheduled security checks. Doc. 81-22 (Malone deposition) 133-135; Doc. 81-5 (Leonard deposition) 126-127. During these visits, Kahle's cell door remained wide open. Doc. 81-7 (Kahle deposition)

122-123. Leonard testified the first visit lasted only three minutes. Doc. 81-4 pp. 112, 116.[3] During each of the three separate visits Kahle and Leonard engaged in various forms of sexual activity. APP. 24a. Leonard contends that Kahle was the instigator of the sexual activity and was a willing participant during all three encounters. Doc. 81-4 pp. 104-116, Doc. 81-5 pp. 117-132. Kahle disputes that the sexual activity was consensual.

During the time when Leonard was visiting Kahle's cell, Malone was sitting at a workstation in the cell block filling out an evaluation report on Leonard. APP. 24a. The workstation contained a panel of lights which indicated whether cell doors were locked or unlocked. APP. 24a. Jail policy stated that the entry of a correctional officer into a cell after lockdown was an event that needed to be entered into the shift log. APP. 7a. Each time Leonard unlocked the door to Kahle's cell, a light on the workstation panel near Malone would have switched from green (locked) to red (unlocked) and would have stayed red until the door was locked again. APP. 8a. Malone testified that he did not notice the lights on the control panel change color, and he did not note in the shift log that Kahle's cell had been entered by a correctional officer after lockdown. APP. 39a.

Malone testified that he could not physically observe what occurred in Kahle's cell due to physical obstructions. APP. 16a. However, the Pennington County Sheriff testified that Kahle's cell door was visible from the workstation. *Id.* Furthermore, Kahle testified that during one of Leonard's

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[3] The Eighth Circuit states one visit may have lasted five minutes. APP. 15a. It is unclear where that information is located in the record.

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visits, Malone looked up and saw her standing at her cell door with Leonard looking at some artwork. Doc. 81-7 (Kahle deposition) p. 37.

Furthermore, Leonard testified that he told Malone he was going to Kahle's cell before each visit. APP. 8a. After Leonard's second visit to Kahle's cell, Leonard returned to the workstation with drawings Kahle had made and told Malone that he was going to trace one of the drawings (a heart encircled by a rose). APP. 8a. After tracing the artwork, Leonard told Malone that he was going to return the drawings to Kahle. *Id.*

An intercom located inside Kahle's cell allowed Kahle to communicate with the workstation where Malone was seated. At no time did Kahle use the intercom to alert Malone as to any misconduct by Leonard or to ask Malone to prevent Leonard from returning to her cell. Doc. 81-7 (Kahle deposition) pp. 117-118; Doc. 81-5 (Leonard deposition) pp. 145-146. Nor is there any evidence that Kahle screamed out or made any effort whatsoever to alert Malone or any other inmate that Leonard was doing anything inappropriate or that she needed assistance of any kind. And, as might be expected, Leonard did not inform Malone that he was having sexual relations with Kahle during his visits to her cell. Doc. 81-4 (Leonard deposition) pp. 107, 116; Doc. 81-5 (Leonard deposition) pp. 130, 135, 166.

After Leonard's third visit to Kahle's cell Leonard's and Malone's shifts ended and they left work for the day. Subsequently, someone (not Kahle) alerted jail personnel that Kahle and Leonard may have had a sexual encounter. An investigation was conducted and the allegation was substantiated. APP. 25a. Leonard's employment was

terminated, he was criminally charged with sexual contact with an inmate, pled guilty and served a sentence in jail.[4]

The Pennington County Jail has in place policies designed to protect inmates from harm caused by improper actions by correctional officers. APP. 25a-26a, 33a. The district court found that prior to the incident involving Kahle, there had been only one other incident of sexual assault at the Jail and that incident was fully investigated resulted in the termination and prosecution of the offending correctional officer. APP. 35a. The district court found that there was no persistent or widespread history of correctional officers sexually assaulting inmates at the Pennington County Jail. APP. 26a, 31a-32a and 35a-36a. The district court found that there was nothing in the record to show the jail administrators were on notice that there was any inadequacy in their training procedures or supervision that made it likely to result in a constitutional violation. APP. 36a-37a.

> Holloway and Shuft had not received complaints regarding Leonard. Nor were they on notice of a pattern based on other incidents at the Jail. Only one other sexual assault had occurred at the Jail before the incident involving Kahle, and that incident was fully investigated, resulting in the termination and prosecution of the CO. Kahle has failed to present evidence that Holloway and Schuft had notice of a pattern of unconstitutional acts committed by subordinates.

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[4] S.D.C.L. § 24-1-26.1 makes it a felony for an employee of a detention facility to knowingly engage in an act of sexual penetration with a person who is in detention and under the custodial authority of the person so engaging.

APP. 35a-36a. Leonard testified that he knew his conduct was a violation of Pennington County Jail policy. APP. 26a.

To summarize, the district court found that nothing was disclosed during Leonard's background check or during Leonard's training "that showed he posed a risk to inmates or would require additional or different supervision." APP. 23a. The district court also found that "Leonard never had been involved in a sexual assault of an inmate, so County Defendants had no notice he would commit [a sexual assault on an inmate]." APP. 32a. Furthermore, the district court found "no evidence had been presented to show a persistent and widespread pattern of misconduct amounting to a county custom or policy of overlooking this conduct by COs" APP. 33a. "[T]he evidence presented does not demonstrate a persistent and widespread pattern of misconduct[.]" APP. 35a.

REASONS FOR GRANTING THE WRIT

I. This Court should provide guidance regarding a question which it has previously expressly left open concerning an important issue in § 1983 cases based on an alleged failure to prevent inmate assault, and which is critical to qualified immunity analysis in those cases: When does a risk of inmate assault become sufficiently substantial to satisfy the objective component of a conditions-of-confinement claim?

Dee Farmer, an eighteen year old biologically male transsexual who "'projects feminine characteristics'" was sentenced to federal prison for credit card fraud. *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). During his incarceration Farmer was beaten and raped by another inmate in his cell. *Id.* at 830.

Farmer brought suit against various prison officials alleging they violated his Eighth Amendment rights when they failed to protect him from inmate attack. *Id.* at 830-831. The district court granted summary judgment to the defendants which was summarily affirmed by the Court of Appeals for the Seventh Circuit Court of Appeals. *Id.* at 831-832. The Supreme Court of the United States granted certiorari to resolve inconsistencies in the Courts of Appeal regarding the standard for "deliberate indifference." *Id.* at 832.

The Supreme Court began by noting that prison officials must provide humane conditions-of-confinement to inmates which includes a duty to take reasonable measures to guarantee the safety of the inmates. *Id.* at 832-833. It then set forth the requirements for imposing liability on prison officials when it is alleged they have failed to prevent harm to an inmate:

> [A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious," [citations omitted]; a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities," [citations omitted]. For a claim (like the one here) based on a failure to prevent harm, ***the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm***. [citation omitted].

Id. at 834 (emphasis added).[5] Following the text quoted above, the court inserted a footnote:

> At what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it.

Id. at 834, n. 3.

A. Deciding This Question Will Affect a Very Large Number of Cases

It is important to resolve the question which *Farmer* left open because prisoner civil rights and prison conditions cases account for between 8.3% and 9.8% of the new filings in federal district courts. *Woodford v. Ngo*, __ U.S. __, __, n.4, 126 S. Ct. 2378, 2388, n.4 (2006). If a prison official in such cases asserts qualified immunity, the courts will be called upon to analyze whether the facts alleged and which are supported by the record show the official's conduct violated a constitutional right. *Scott v. Harris*, __ U.S. __, __, 127 S. Ct. 1769, 1774 (2007); *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004); *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In doing so, the courts will have to analyze whether the allegations satisfy the two requirements — the objective component and the subjective component — of such claims. *Farmer*, 511 U.S. at 834. When the inmate's claim is that a prison official violated the inmate's constitutional rights by failing to prevent harm, "the inmate must show that he is

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[5] The second requirement — that the official must have a sufficiently culpable state of mind — is discussed in the second portion of this Petition.

incarcerated under conditions posing a substantial risk of serious harm." *Id.* Therefore, the lower courts need guidance to help them determine "when the risk of harm...changes from being *a* risk of *some* harm to a *substantial* risk of *serious* harm." *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1051 (9th Cir. 2002).

B. Resolution of the Issue is Essential For Analysis of Qualified Immunity in Failure to Protect Cases

The fact that the question of when a risk to inmates becomes sufficiently substantial for Eighth Amendment purposes remains unanswered is also relevant to the second prong in the qualified immunity analytical framework. If the court finds that the allegations supported by the record state the violation of a constitutional right, "'the next sequential step is to ask whether the right was clearly established...in light of the specific context of the case.'" *Scott*, 127 S. Ct. at 1774, quoting *Saucier*, 533 U.S. at 201. "'The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Brosseau*, 543 U.S. at 199, quoting *Saucier*, 533 U.S. at 202.

In *Estate of Ford*, an inmate was killed by his cellmate. The estate of the deceased inmate sued various prison officials alleging that they failed to protect him from assault by housing him with a dangerous inmate. 301 F.3d at 1045. The correctional officers moved for summary judgment on grounds of qualified immunity. The district court denied immunity finding that there were triable issues of fact with respect to whether the Defendants were deliberately indifferent to a substantial risk of serious harm. *Id.*

The Ninth Circuit reversed the district court. The Ninth Circuit found that if the officials knew the other inmate was acting dangerously with cellmates or posed a threat to the decedent but housed the decedent with the inmate anyway such conduct would violate the Eighth Amendment. *Id.* at 1050. The court then moved on to consider whether the constitutional right was clearly established. *Id.*

In its consideration of the second prong of the qualified immunity analysis the Ninth Circuit states:

> Therefore, it is not sufficient that *Farmer* clearly states the general rule that prison officials cannot deliberately disregard a substantial risk of serious harm to an inmate; here, in addition, it is relevant that neither *Farmer* nor subsequent authorities has fleshed out "at what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes." [citation omitted]. Thus, it would not be clear to a reasonable prison official when the risk of harm from double-celling psychiatric inmates with one another changes from being *a* risk of *some* harm to a *substantial* risk of *serious* harm. *Farmer* left that an open issue. This necessarily informs "the dispositive question" of whether it would be clear to reasonable correctional officers that their conduct was unlawful in the circumstances that [they] confronted.

Id. at 1050-51. The Ninth Circuit found that the officials were "entitled to qualified immunity because it would not have been clear to a reasonable correctional officer knowing what each knew" that housing the psychiatric inmate with the decedent "posed such a substantial risk of serious harm that doing so would be constitutionally impermissible." *Id.* at 1053.

The Seventh Circuit has also noted that this important question remains unanswered:

> [I]t has for some time been unclear "[a]t what point a risk of inmate assault becomes sufficiently substantial" for purposes of a failure to protect claim.

Brown v. Budz, 398 F.3d 904, 911 (7th Cir. 2005).

The lack of clearly established law on this open question has prompted district courts to grant qualified immunity to correctional officials in several failure-to-protect claims. *Robertson v. Newland*, 2006 WL 509773 (E.D. Cal. 2006) (unpublished); *Dale v. Betancourt*, 2006 WL 335358 (N.D. Cal. 2006) (unpublished); *Nelson v. CA. Dept. of Corrections*, 2004 WL 569529 (N.D. Cal. 2004) (unpublished) and *Boyd v. Fallman*, 2003 WL 262323 (N.D. Cal. 2003) (this list is illustrative and not all-inclusive).

C. The Eighth Circuit's Decision Conflicts with Decisions from the Tenth Circuit

The Eighth Circuit's decision in this case does not expressly state why Kahle was exposed "to a substantial risk that Leonard would sexually assault Kahle [.]" APP. 17a. Its reasoning may be inferred from the following language from the opinion:

> [Malone] knew that Leonard, a trainee with barely a month's experience working at the Jail (and therefore not someone whom Malone would have any reason to trust), went to a female detainee's cell three times after lockdown within the space of an hour. On at least one of those occasions, Leonard stayed in her cell for at least five minutes.

APP. 15a. This language implies that Kahle was exposed to a substantial risk that Leonard would sexually assault her simply due to the fact that Leonard visited her cell on three occasions after lockdown. However, the Eighth Circuit fails to discuss in that context the district court's findings that "Leonard never had been involved in a sexual assault of an inmate, so county defendants had no notice he would commit such an act." APP. 32a. Nor did the Eighth Circuit discuss the district court's finding that "[t]here were no complaints or other indications during Leonard's training that showed he posed a risk to inmates or would require additional or different supervision." APP. 23a. Likewise, the Eighth Circuit failed to discuss the district court's finding that "no evidence has been presented to show a persistent and widespread pattern of misconduct amounting to a county custom or policy of overlooking misconduct by COs." APP. 33a.

The Eight Circuit's determination that Kahle was exposed to a substantial risk of sexual assault by Leonard indicates that it believed the risk to be "obvious".

> It is true, as Malone argues, that he cannot be charged with inferences that he did not actually draw. But the Supreme Court has explained that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842, 114 S. Ct. 1970.

APP. 16a-17a. To the extent the Eighth Circuit's opinion finds an obvious risk of sexual assault existed merely because a male correctional officer visited a female inmate's cell, the Eighth Circuit's decision is contrary to two decisions from the Tenth Circuit Court of Appeals.

1. *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998)

Contrary to jail policies, on two separate occasions a male guard (Pulsipher) removed female inmates from their cells and escorted them to an unmonitored area in the jail where he sexually assaulted them. Extensive pre-employment background checks disclosed nothing that indicated Pulsipher was unfit for duty and nothing in the record indicated Pulsipher posed a risk to inmates. *Id.* at 1304-05.

The district court granted the sheriff and county commissioners summary judgment finding them immune from suit on grounds they had not been deliberately indifferent to a risk of assault. The lack of any prior incidents by Pulsipher or other jailers did not put them on notice of a substantial risk of harm to inmates. *Id.* at 1306.

The plaintiff argued that the defendants' subjective knowledge of the risk was established by the fact that the jail had adopted policies requiring two jailers to be present when female prisoners were removed from their cells. This, they claimed, reflected the defendants' understanding that there was a substantial risk to female inmates of sexual misconduct when only one male jailer was present. *Id.* at 1310-1311. The Tenth Circuit rejected that argument:

> [W]e decline to find knowledge...of a substantial risk of harm from the mere fact of Mr. Pulsipher's gender. Without any evidence of sexual misconduct in Mr. Pulsipher's background or any evidence of previous incidents of sexual misconduct by...jailers, plaintiffs have failed to raise a fact question on whether the Sheriff and the Commissioners acted with deliberate

> indifference under either an objective or subjective standard.

Id. at 1311.

2. *Hovater v. Robinson*, 1 F.3d 1063 (10th Cir. 1993)

The *Hovater* decision bears some striking similarities to this case.

Robinson was certified as eligible for employment at a jail in Kansas. He received proper training and was given high performance evaluations by his supervisors during his employment. Prior to the incidents at issue in this case, there were no complaints of sexual misconduct by Robinson or any other jailers. *Id.* at 1064.

Jail policies were in place designed to minimize situations where unsupervised male guards would be alone with female inmates. *Id.* at 1065.

A combination chapel/library was located on the third floor of the jail. On several occasions over a two day period Robinson called Hovater to the third floor purportedly to work in the library. Hovater claimed Robinson sexually propositioned her and on one occasion forcibly sodomized her. Hovater reported the incident and Robinson subsequently resigned. *Id.* at 1064-65.

Hovater brought suit alleging, among other things, the sheriff failed to properly supervise Robinson. *Id.* The district court denied the sheriff's qualified immunity motion. The district court found that, although the sheriff did not have actual knowledge of Robinson's conduct, the sheriff had constructive knowledge of the risk of injury due to the fact

that the sheriff was aware Robinson had unsupervised care and custody of female inmates. *Id.* at 1065-66. The sheriff appealed.

The Tenth Circuit noted that there is no constitutional requirement that jailers and inmates be of the same gender. The existence of policies against male guards having unsupervised care for female inmates was not evidence of an obvious risk that females left alone with male guards are likely to be assaulted. That was especially true in light of the fact that there was no prior indication that Robinson posed a threat to female inmates. *Id.* at 1066-68.

> To find a harm present in these circumstances would, in effect, require the conclusion that every male guard is a risk to the bodily integrity of a female inmate whenever the two are left alone. There is absolutely no evidence in this record to support that conclusion. **A constitutional violation may not be established by reliance on unsupported assumptions**.

Id. at 1068 (emphasis added).

The district court in this case found, as in the cases discussed above, there was no prior indication that Leonard or any other jailer at the Pennington County Jail posed any risk of assault to Kahle or any other inmate and that there was no persistent or widespread pattern of misconduct by jail officials. APP. 23a, 32a-33a.

The Eighth Circuit's opinion in this case states that Malone's subjective knowledge of a risk of assault to Kahle could be inferred from the fact the risk is "obvious". APP. 16a-17a. However, as the Tenth Circuit has held, the mere fact that a male correctional officer was alone with a female

inmate, especially in light of the fact there was no prior indication that the CO had any propensity to assault inmates, does not make the risk of sexual assault to the inmate "obvious." The fact the Eighth Circuit Opinion is contrary to the Tenth Circuit opinions indicates the law on this issue is not clearly established and Malone would therefore be entitled to qualified immunity. *Scott*, 127 S. Ct. at 1774, *Saucier*, 533 U.S. at 201-202, *Brosseau*, 543 U.S. at 199.

A question critical to analysis of a failure-to-protect claim, and consequently critical to analysis of qualified immunity remains unanswered. The uncertainty in the law is causing courts of appeals to issue conflicting opinions. This Court should resolve the issue to provide lower courts the guidance needed in prison cases which make up such a large percentage of their caseload.

II. THIS COURT SHOULD PROVIDE GUIDANCE TO LOWER COURTS AS TO WHEN A RISK OF ASSAULT IS SUFFICIENTLY OBVIOUS TO OVERCOME A CORRECTIONAL OFFICIAL'S CLAIM OF QUALIFIED IMMUNITY UNDER CIRCUMSTANCES WHERE THE OFFICIAL DENIES THAT FACTS LED HIM TO INFER THAT ANY INMATE WAS EXPOSED TO A SUBSTANTIAL RISK OF SERIOUS HARM.

To violate the Cruel and Unusual Punishments Clause of the Eighth Amendment a prison official must have a "'sufficiently culpable state of mind.'" *Farmer*, 511 U.S. at 834, quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). The "culpable state of mind" necessary to support official liability in a failure to protect case is deliberate indifference to inmate health or safety. *Farmer*, 511 U.S. at 834. "[D]eliberate

indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability." *Id.* at 841

Farmer defined the culpable state of mind necessary to constitute deliberate indifference in a failure-to-protect case. In *Farmer* the Supreme Court specifically rejected an objective — "knew or should have known" — standard for deliberate indifference. *Id.* at 835-840.

> [W]e cannot accept Petitioner's argument that *Canton* compels the conclusion here that a prison official who was unaware of a substantial risk of harm to an inmate may nevertheless be held liable under the Eighth Amendment if the risk was ***obvious*** and a reasonable prison official would have noticed it. (emphasis added)

Id. at 841-42.

> It is not enough merely to find that a reasonable person would have known or that the defendant should have known, and juries should be instructed accordingly.

Id. at 843, n.8.

After rejecting an objective standard for deliberate indifference, the court specifically adopted a subjective test of deliberate indifference modeled after the criminal law standard for recklessness. *Id.* at 839-840.

> We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be

> aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference....[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendations, cannot under our cases be condemned as the infliction of punishment

Id. at 837-38.

A question presented by this case is how the above-quoted legal principles apply in the context of a prison official's claim of qualified immunity in a failure to protect case.

A. Qualified Immunity Principles

> Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." [citation omitted]. The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."

Saucier, 533 U.S. at 200-01, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis original in *Mitchell*). The goal of qualified immunity is to "'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" *Saucier*, 533 U.S. at 202, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

> If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.

Saucier, 533 U.S. at 202. Qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Saucier*, 533 U.S. at 202, quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In *Saucier*, the Supreme Court noted that the denial of summary judgment any time a material issue of fact exists "could undermine the goal of qualified immunity [.]" *Saucier*, 533 U.S. at 202.

> When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion. [citations omitted]. In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

Scott, 127 S. Ct. at 1774-75. Thus, courts are admonished not to deny qualified immunity on grounds that a dispute of facts exist; rather, courts must resolve factual disputes in the non-moving party's favor and then apply qualified immunity principles to determine whether an official is immune from suit.

B. Application of Qualified Immunity Principles in a Failure to Protect Case

The threshold inquiry in analyzing a qualified immunity claim is to determine whether, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. In the context of a failure-to-protect claim the court considering qualified immunity would need to determine whether the facts alleged show that the correctional

official failed to "'take reasonable measures to guarantee the safety of inmates[.]'" *Farmer*, 511 U.S. at 832, quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984). This would require the court to determine whether the allegations state a violation of both the objective and subjective components of such claims. *Farmer*, 511 U.S. at 834.

As set forth above, to satisfy the subjective component of a failure-to-protect claim, the facts alleged would have to show the correctional official was deliberately indifferent to a substantial risk of serious harm to the inmate. *Id.* at 837-38. The facts alleged would have to show that the official was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

The law places on the plaintiff the burden of showing that the correctional official had a sufficiently culpable state of mind such that it may properly be said that the official unnecessarily and wantonly inflicted pain on the inmate. *Farmer*, 511 U.S. at 834. The plaintiff is at a distinct disadvantage under circumstances where a correctional official denies that he knew of facts from which he could infer the existence of a substantial risk, or that he knew the facts but failed to form the inference.

To address that situation, the U.S. Supreme Court stated:

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence [citation omitted], and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was ***obvious***.

Farmer, 11 U.S. at 842. (emphasis added) It was this language that the Eighth Circuit relied on when it affirmed the District Court's denial of qualified immunity to Tim Malone. APP. 16a-17a.

C. The Eighth Circuit's Decision Conflicts with Decisions from the Tenth Circuit and Principles Set Forth in Supreme Court Precedent

The Eighth Circuit's holding begs the question: how obvious must the risk of harm be to create a genuine issue for trial and overcome an official's qualified immunity claim?

The Eighth Circuit determined that Kahle was exposed to a substantial risk of sexual assault because Leonard visited her cell three times after lockdown within the space of an hour, and on at least one of those occasions, stayed in her cell for at least five minutes. APP. 15a. However, as stated above, the Tenth Circuit has held that a risk of sexual assault is not obvious merely because female inmates are left alone with male correctional officers. *Hovater*, 1 F.3d at 1066-68. "A constitutional violation may not be established by reliance on unsupported assumptions." *Id.* at 1068. See also *Barney*, 143 F.3d at 1311: "Without any evidence of sexual misconduct in [the correctional official's] background or any evidence of previous incidents of sexual misconduct by...jailers, plaintiffs have failed to raise a fact question on whether the Sheriff and the Commissioners acted with deliberate indifference under either an objective or subjective standard."

Moreover, the Eighth Circuit's opinion violates the principles set forth in *Farmer* which rejected an objective standard for deliberate indifference and adopted the criminal recklessness standard for deliberate indifference. *Farmer*, 511 U.S. at 839-840. By allowing a finding of subjective

knowledge of a substantial risk of sexual assault based on such marginal facts (a male correctional officer visiting a female inmate's cell on three occasions) which purportedly make the risk of harm "obvious" the Eighth Circuit is effectively holding that under such circumstances a reasonable official would have known that the risk existed, or that Malone should have known that the risk existed — a finding based on an objective standard that *Farmer* expressly rejects. *Farmer*, 511 U.S. at 843, n.8.

Courts need guidance to help them discern at what point facts from which a correctional official could infer the existence of a substantial risk to inmate health or safety become sufficiently obvious that the official would have to know of the risk so as to create a genuine issue for trial and to overcome an official's claim of qualified immunity and its goal of "'avoid[ing] excessive disruption of government and permit[ing] the resolution of many insubstantial claims on summary judgment.'" *Saucier*, 533 U.S. at 202, quoting *Harlow*, 457 U.S. at 818. Currently that point is undecided, and because it is undecided, the law was not clearly established at the time Leonard assaulted Kahle such that Malone would have fair notice that his conduct — failing to prevent Leonard from visiting Kahle's cell — could properly be characterized as the unnecessary and wanton infliction of pain. *Farmer*, 511 U.S. at 834 ("'[O]nly the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'" quoting *Wilson*, 501 U.S. at 297). Without guidance, courts (like the Eighth Circuit in this case) may employ a standard of obviousness which reduces deliberate indifference from the criminal law standard for recklessness to the civil law's standard for recklessness or even to the lesser standard of negligence.

CONCLUSION

The petition for writ of certiorari should be granted for the foregoing reasons.

Respectfully Submitted,

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